SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 327

EMPRESA SIDERURGICA, S. A., a CORPORATION OF COLOMBIA, SOUTH AMERICA, AND VANDERBURGH & CO., INC., A CALIFORNIA CORPORATION,

Appellants,

vs.

COUNTY OF MERCED, A MUNICIPAL CORPORATION; J. EMMETT McNAMARA, ASSESSOR OF THE COUNTY OF MERCED, ET AL.,

Appellees

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM

MAY IT PLEASE THE COURT:

Appellees in the above entitled cause move the Court to dismiss this appeal or to affirm the judgment below for the following reason:

There is no substantial federal question presented as a basis of jurisdiction in this Court, because the questions presented have been foreclosed by previous decisions of this Court.

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1948

No. 327 327

EMPRESA SIDERURGICA, S. A., a Corporation of Colombia, South America, and VANDERBURGH & Co., INC., a California Corporation,

Appellants,

vs.

COUNTY OF MERCED, a Municipal Corporation; J. EMMETT McNAMARA, Assessor of the County of Merced, et al.,

Appellees.

Appeal from the Supreme Court of the State of California.

BRIEF FOR APPELLEES.

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Appellees.

Appeal from the Supreme Court of the State of California.

BRIEF FOR APPELLEES.

STATEMENT OF THE CASE.

This is an action to obtain a refund of property taxes paid to the County of Merced, a political subdi-

vision of the State of California. The basic controversy is whether the property here involved, on tax day, March 5, 1945, was exempt from tax by reason of the provisions of Article I, section 10, Clause 2 of the Constitution of the United States, prohibiting the states from laying imposts on exports.

The action was tried upon an Agreed Statement of Facts. (R. 17.) This Agreed Statement sets forth that prior to November 11, 1944, negotiations were entered into between Empresa Siderurgica, S. A., a corporation organized under the laws of Colombia, South America, with its principal place of business at Medellin, Colombia, South America, and Henry J. Kaiser Company, a Nevada corporation with its principal place of business in Oakland, California, for the purchase of what is described as the Yosemite Portland Cement Plant, its machinery and equipment, located near the City of Merced, in the County of Merced, State of California. (R. 18.)

Thereafter, on November 11, 1944, Henry J. Kaiser Company entered into a written contract for the sale to Empresa Siderurgica, S. A., of that certain property described as Yosemite Portland Cement Plant. (R. 18.)

While for purposes of convenience, the property sold to appellant, Empresa Siderurgica, was referred to in the contract between seller and purchaser as "the cement plant", and at times is so referred to in this brief, we take issue with the statement appearing at page 7 and elsewhere in appellants'

opening brief, that *an* article was sold to Empresa. Appellants assert that what was sold was one indivisible article. The record shows, however, that although the phrase "cement plant" was used as a convenient method of reference, the property sold consisted of numerous items. It included machinery, equipment, removable structures, removable facilities, spare parts, supplies and miscellaneous items. (R. 23-25, 30-31.) It included such items as gasoline engines, a caterpillar tractor, motors, lathes, wiring supplies, hand tools, twine, furniture and welding equipment and supplies, to mention only a few. (Exhibit 5 of the Agreed Statement of Facts, R. 63-76.) The reference "cement plant" also includes certain machinery, equipment, structures, spare parts and supplies which at one time had been located at a certain quarry at Emory, California, but which when the contract of sale was entered into were located at the site of the main plant at Merced. (R. 23.)

Moreover, certain specific items of machinery, equipment, structures, facilities, parts, supplies and other items were specifically excluded from "the cement plant" sold to Empresa. (R. 25.) This is apparent from Article II C of the Contract of Sale (R. 25) which provided that

> "Certain specific items of machinery, equipment, structures, facilities, parts, supplies, and/or other items as listed in 'Exhibit B' attached hereto and by this reference made a part hereof, are specifically excluded from the cement plant to be sold to Purchaser under this Agreement, and

> title to all of said items in 'Exhibit B' shall remain in Seller or third party".

It is apparent from the foregoing that we disagree with appellants' assertion at page 29 of their opening brief that this case comes before this Court by stipulation that an entire, complete and operative cement plant is the article which was purchased. The best and complete answer to this assertion is the record in this case.

While the statement is made at page 28 of appellants' opening brief that it was warranted in the contract of sale that nothing had been removed between July 1, 1944, and the date of the contract of sale "which would make it inoperative", we wish to point out that the actual wording of the contract (R. 25) was that

> "* * * Seller warrants that it has not thereafter sold or removed any equipment or property from said cement plant except that listed in 'Exhibit B' * * *".

The content of "Exhibit B" is explained by Article II C of the contract (R. 25) above referred to.

The record is silent on the assertion made, at page 10 of appellants' opening brief, that "Exhibit B" contained items not necessary for the operation of the cement plant. Exception of these items further demonstrates that the property sold was not *an* article.

The statement at page 28 of appellants' opening brief that "the exportation of the cement plant was the only act to be done upon the consummation of

the sale" is not correct for the record clearly shows that the property was sold in an undismantled condition. The substantial nature of the work of dismantling and packing required to be done is indicated by the fact that the amount of compensation agreed to be paid to Bigge Drayage Co. for performing such work was $120,000. (R. 38.)

On December 2, 1944, Vanderburgh & Co., Inc., was designated as forwarding agent in place of the forwarding agent originally designated in the contract, and Vanderburgh & Co., Inc., entered into a contract with Bigge Drayage Co. to dismantle the cement plant, disassemble the equipment, package the same for shipment and deliver the property to the Atchison, Topeka and Santa Fe Railway Company at the plant site for transportation by rail to the port of embarkation. (R. 18-19, 30.)

While Bigge Drayage Co. is referred to throughout appellants' opening brief as the "contractor-common carrier", it may help to thin the legal thicket if we emphasize at this point that Bigge Drayage Co. was not employed to and did not perform the functions of a common carrier in this case. Here it merely performed the functions of a dismantler. All of its activities in so far as the present problem is concerned were performed at the plant site. It did not carry any of the property over the public highways. It merely dismantled and packaged the property at the plant site, from whence the property was carried by the Atchison, Topeka and Santa Fe Railway Company, whose tracks included a siding at the plant site.

The contract between Henry J. Kaiser Company and Empresa Siderurgica provided that title to the property, with the exception of the items set out in "Exhibit B" of the contract, should be transferred to and vest in the purchaser upon the occurrence of two conditions: (1) the issuance by the appropriate officials of the export permit or license required by the contract, and (2) the establishment of a letter of credit in accordance with the terms of the contract. (R. 19-20.)

On December 15, 1944, the Foreign Economic Administration in Washington, D. C., issued an export license to the Henry J. Kaiser Company and on January 3, 1945, a letter of credit covering the unpaid balance of the purchase price of the property was deposited with a bank in favor of the Henry J. Kaiser Company. (R. 20.)

On January 3, 1945, Vanderburgh & Co., Inc., and Bigge Drayage Co. entered into possession of the plant and immediately began to dismantle and disassemble the plant and package it on the site, in preparation for shipment abroad to Colombia, South America. (R. 21.)

On March 5, 1945, the County Assessor of Merced County assessed personal property taxes against the cement plant. (R. 21.) The estimated status of the plant as of tax day, March 5, 1945, was as follows:

12% had been shipped out of the county;

10% had been dismantled and crated or packaged for shipment;

34% had been dismantled but not crated or packaged for shipment;

44% had not been dismantled. (R. 22, 83-84.)

The assessment as finally adjusted and paid excluded the 12% which had been shipped out of the county prior to March 5, 1945. (R. 22.)

On January 18, 1946, the plant had been packaged and shipped out of the County of Merced and on January 29, 1946, the plant had been completely shipped out of California and the United States. (R. 22.)

This action subsequently was brought by Empresa Siderurgica, S. A., and Vanderburgh and Co., Inc., to recover the amount of taxes paid under protest. The trial court rendered judgment in favor of the plaintiffs. (R. 96.) On appeal the Supreme Court of California reversed the judgment of the trial court and held in favor of the defendants. (R. 104.)

SUMMARY OF ARGUMENT

In *Richfield Oil Corporation v. State Board of Equalization*, 329 U.S. 69, 79, this Court, quoting from *Coe v. Errol*, 116 U.S. 517, 527, stated that the correct principle governing exports is that

> "goods do not cease to be part of the general mass of property in the State, subject, as such, to its jurisdiction, and to taxation in the usual way, until they have been shipped, or entered with a common carrier for transportation to an-

other State, or have been started upon such transportation in a continuous route or journey."

None of the property here assessed had been shipped, or entered with a common carrier for transportation to a foreign destination or started upon such transportation in a continuous route or journey. On tax day, March 5, 1945, all of the property taxed still was at the site where it was located when it was purchased, and approximately half of it had not even been dismantled. Most of that which was dismantled had not been packaged and none of the property taxed had been loaded on the cars of the railroad which was to carry it away from the plant site.

Intent to export property does not confer upon it an exempt status, nor does the existence of a contract of sale of property to be exported. *Cornell v. Coyne,* 192 U.S. 418. See *Coe v. Errol,* 116 U.S. 517, and *Heisler v. Thomas Colliery Co.,* 260 U.S. 245. *Cornell v. Coyne,* supra, involved a contract which required the seller to ship its entire output of cheese during a specified period to a foreign destination. This Court said Article I, Section 9, Clause 5 of the Constitution did not prevent application of the federal tax there involved. ". . . The exemption attaches to the export and not to the article before its exportation. . . ." (p. 427.)

In this case, the firm employed to dismantle the property, Bigge Drayage Co., also held a certificate from the Interstate Commerce Commission permitting it to operate as a common carrier. However, Bigge

was not employed to and did not perform the functions of a common carrier here. It was employed to dismantle the property and prepare it for shipment. It was not employed to transport the property away from the plant site. All of the services performed by it were performed on the plant site. In view of the fact that the property had to be dismantled and packaged before it could be transported away from the plant site and in view of the fact that Bigge was not employed to perform and did not perform the functions of a common carrier in this case, but only the functions of a dismantler, the property, while being dismantled by Bigge, was not in a position equivalent to property which has been delivered to a common carrier for transportation.

Employment of a forwarding agent by the purchaser did not confer an exempt status on the property taxed. Property which has to be dismantled and prepared for shipment is not an export whether arrangements for dismantling and preparation for shipment are made directly by the purchaser or through a forwarding agent. The substantial nature of the dismantling operations is indicated by the compensation of $120,000 agreed to be paid to the dismantler. (R. 38.)

The facts of this case are materially different from those in *A. G. Spalding & Bros. v. Edwards*, 262 U.S. 66, and in *Richfield Oil Corp. v. State Board of Equalization*, 329 U.S. 69. In the *Spalding* case the goods had been delivered on board a vessel of a common carrier and this Court said that ". . . The overt

act of delivering the goods to the carrier marks the point of distinction between this case and *Coryell v. Coyne,* 192 U.S. 418. . . ." In the *Richfield* case, the oil was delivered into the hold of the purchaser's ship and this Court said ". . . That delivery marked the commencement of the movement of the oil abroad. . . ." The facts of the instant case present a sharp contrast from the *Spalding* and *Richfield* cases, for here approximately half of the property taxed had not even been dismantled, most of that which had been dismantled had not been packaged, none of the property taxed had been loaded on the cars of the railroad which was to carry it away from the plant site, all of the property taxed still was at the site where it was located when it was purchased, and some of it remained in the county for nearly another year, receiving the police protection, fire protection and other services and benefits afforded by the County of Merced and the State of California.

The "cement plant" here involved included numerous items, consisting mainly of items of machinery and equipment. Appellants' argument, that the property was one indivisible article and that when a portion of it had been shipped all thereby acquired an export status, disregards the physical facts and the applicable legal principles.

The property which had not been dismantled clearly had not commenced its final journey out of the state, but the same also is true of that which had been dismantled for such movement as was involved in dismantling and packaging the property was preparatory

or preliminary in nature and was not the movement which launched the property on its final journey out of the state. *Cornell v. Coyne*, 192 U.S. 418, *Coe v. Errol*, 116 U.S. 517.

To grant exemption here would not be consistent with the prior decisions of this Court or the purpose of the Import-Export Clause. It would create a broad area of tax exemption and afford opportunities for tax avoidance not contemplated in the framing of the Import-Export Clause.

Under the test laid down by this Court in *Richfield Oil Corp. v. State Board of Equalization*, 329 U.S. 69, 79, none of the property here taxed was exempt as an export, for none had been "shipped, or entered with a common carrier for transportation to another State, or . . . started upon such transportation in a continuous route or journey." None of the property taxed, therefore, had ceased to be part of the general mass of property in the State, "subject, as such to its jurisdiction, and to taxation in the usual way. . . ." (P. 79.)

ARGUMENT.

I. NONE OF THE PROPERTY TAXED HAD AN EXPORT STATUS ON TAX DAY.

The applicable principle in determining when property ceases to be part of the general mass of property in the state and acquires an exempt status is stated in *Richfield Oil Corporation v. State Board of Equalization*, 329 U.S. 69, 79, wherein this Court in referring to *Coe v. Errol*, 116 U.S. 517, declared:

"* * * What the Court said concerning commerce is what we deem to be the correct principle governing exports: 'goods do not cease to be part of the general mass of property in the State, subject, as such, to its jurisdiction, and to taxation in the usual way, until they have been shipped, or entered with a common carrier for transportation to another State, or have been started upon such transportation in a continuous route or journey.'"

None of the property here taxed had been shipped, or entered with a common carrier for transportation to a foreign destination or started upon such transportation in a continuous route or journey. All of the property taxed still was on tax day, March 5, 1945, at the site where it was located when it was purchased. Some 44% of the property sold to appellant Empresa Siderurgica (approximately half of the property taxed), had not even been dismantled, most of that which had been dismantled had not been packaged, and none of the property taxed had been loaded on the railroad cars.

This Court in *Coe v. Errol,* 116 U.S. 517, draws a clear distinction between preparation for shipment and actual commencement of the journey. In *Coe v. Errol* certain logs were cut down in New Hampshire and hauled to the Town of Errol in that State where they were on tax day, resting on the banks of a stream down which they were to be floated to the State of Maine, there to be manufactured and sold. This Court upheld the imposition of the tax upon the basis that

the interstate movement of the logs had not commenced by the time the tax was imposed.

The instant case presents an even stronger basis for sustaining the validity of the tax than was present in *Coe v. Errol*. Here a portion of the property still was standing in an undismantled condition. It had not even been "cut down". In *Coe v. Errol* even though the logs had been cut down and hauled to the Town of Errol it was held that their exportation had not commenced. It was so held even though the logs were acquired by a citizen of another state for use in that state.

This Court in *Coe v. Errol* in the course of its opinion, at page 524, pointed out that the products of a state though intended for exportation to another state and partially prepared for that purpose by being deposited at a place or port of shipment within the state are liable to be taxed like other property within the state. This Court in effect held that the logs cut in New Hampshire were not actually started in the course of transportation, that they had not commenced their final movement for transportation from the state of their origin to that of their destination.

This Court stated that certainly so long as the products, such as wheat and corn, are on the lands which produced them, they are part of the general property of the state. They continue to be until they have entered upon their final journey for leaving the state. At page 528 of the opinion it is stated:

> "But this movement does not begin until the articles have been shipped or started for trans-

portation from the one State to the other. The carrying of them in carts or other vehicles or even floating them to the depot where the journey is to commence is no part of that journey. That is all preliminary ~~work~~ performed for the purpose of putting the property in a *state of preparation and readiness for transportation.* * * *" (Emphasis added.)

In *Cornell v. Coyne*, 192 U. S. 418, this Court held that a federal manufacturing tax on filled cheese did not violate the provision of the Constitution forbidding the imposition by the Federal Government of taxes on "articles exported from any state". (Article I, section 9, Clause 5.) *This Court so held even though the record in that case shows that the cheese was manufactured under contracts providing for the manufacture and sale of cheese exclusively for export during the period there involved.* It said that the goods were not in the process of exportation at the time of the imposition of the tax, but were merely in the course of preparation for export. This Court rejected the argument that goods are exempt from tax merely because they are manufactured with the intention and purpose of exporting them and they are ultimately exported.

The plaintiffs in *Cornell v. Coyne* actually exported over a million and a half pounds of filled cheese, their entire output during the period involved, yet this Court found no constitutional infirmity in the tax there involved. This Court said that articles exported are not relieved from the prior ordinary burdens of

taxation, that the exemption attaches to the export and not to the article before its exportation, that the prohibition of both export clauses of the Constitution has reference to the imposition of duties on goods by reason of or because of their exportation or intended exportation or while they are being exported.

In the course of its opinion this Court said at page 427:

> "* * * A farmer may raise cattle for the purpose of exportation, and in fact export them. Can it be that he is entitled to a return of all property taxes which have been cast upon those cattle? A true construction of the constitutional provision is that no burden by way of tax or duty can be cast upon the exportation of articles, and does not mean that articles exported are relieved from the prior ordinary burdens of taxation which rest upon all property similarly situated. The exemption attaches to the export and not to the article before its exportation * * *"

See also *Heisler v. Thomas Colliery Co.*, 260 U.S. 245, 259-261, upholding, against interstate commerce clause objections, a tax upon coal ready for shipment, including that intended for shipment out of the state, in which this Court said that:

> "* * * If the possibility, or, indeed, certainty of exportation of a product or article from a State determines it to be in interstate commerce before the commencement of its movement from the State, it would seem to follow that it is in such commerce from the instant of its growth or production, and in the case of coals, as they lie in the ground. * * *

"* * * In *Coe v. Errol*, 116 U.S. 517, the precise contention here made was passed upon and rejected. It involved the taxing power of a State, and the property subject to it (timber cut in its forests) was intended for exportation and had progressed nearer to exportation than the coal in the present case.

"The question in the case was said to be 'whether the products of a State (in this case timber cut in its forests) are liable to be taxed like other property within the State, though intended for exportation to another State, and partially prepared for that purpose by being *deposited at a place of shipment, such products being owned by persons residing in another State.*' And again, 'Do the owner's state of mind in relation to the goods, that is, his intent to export them, and his partial preparation to do so, exempt them from taxation?' In answer to the questions, the point of time when goods cease to be under the power of the State and come under the protection of the Constitution was considered. To express it, as the Court did, 'there must be a point of time when they (goods) cease to be governed exclusively by the domestic law and begin to be governed and protected by the national law of commercial regulation, and that moment seems to us to be a legitimate one for this purpose, in which they commence their final movement for transportation from the State of their origin to that of their destination.'" (Emphasis added.)

In an effort to distinguish the case of *Cornell v. Coyne*, 192 U.S. 418, appellants, at page 41 of their opening brief, assert that although the filled cheese

was manufactured for export, this Court held that the manufacturing process was not commerce. At this juncture, it may be observed that dismantling property involves preparatory activities in advance of shipment as does manufacturing. The substantial nature of the dismantling activities here is indicated by the compensation of $120,000 provided for in the dismantling contract. (R. 38.)

Appellants argue that the filled cheese was not filled cheese until it was manufactured and that it could not move in commerce as filled cheese until it had become filled cheese. Similarly here the property could not move in commerce until dismantled and prepared for shipment. Moreover, in *Carnell v. Coyne*, supra, the cheese had been manufactured and placed in packages prior to the time the revenue stamps were applied for. This was in accordance with the Commissioner's Regulations under the applicable statute.

The record does not justify the statement made by appellants at page 42 of their opening brief that nothing was required in connection with the property here involved except to export it. If this were true, why were contracts made for dismantling the property and preparing it for shipment? It hardly is accurate to state that nothing is required with respect to undismantled property except to export it. And to argue, as appellants do at page 42 of their brief, that the Constitution does not require a person to do an impossible act to qualify for the benefits granted under the Constitution, is in effect to argue that property should be granted the immunity of an export before it

has become an export. Such contention is directly contrary to the principles announced by this Court in *Cornell v. Coyne,* and other leading decisions.

In these cases such as *Richfield Oil Corp. v. State Board of Equalization,* 329 U.S. 69, *Cornell v. Coyne,* 192 U.S. 418, and *Coe v. Errol,* 116 U.S. 517, involving the question whether the interstate or foreign journey has commenced, this Court draws a distinction between preparation for shipment and the actual commencement of the movement of the goods in the course of the interstate or foreign journey. In view of these decisions we think it is apparent from the Agreed Statement of Facts that none of the property taxed was in export on tax day. Indeed, the Agreed Statement specifically sets forth that on January 3, 1945, Vanderburgh & Co., Inc. and Bigge Drayage Co. entered into possession of the plant and immediately began to dismantle and disassemble the plant and package it on the site *in preparation for* shipment abroad to Colombia, South America. (R. 21.) The contract between Vanderburgh & Co., Inc. and Bigge Drayage Co. was, as its title indicated, a "Contract for Dismantling and Preparation for Shipment of Yosemite-Portland Cement Plant". (R. 30.)

The property taxed consisted of 44% of the property sold which had not been dismantled, 34% which was dismantled but not crated or prepared for shipment and 10% which was dismantled and crated or prepared for shipment. There was excluded from the assessment the 12% which had been shipped prior to tax day. All of the property taxed was still at the plant site.

None had been loaded on railroad cars or even placed in the possession of the Atchison, Topeka and Santa Fe Railway Company which was to carry the property from the plant site to the port of shipment. It seems evident, therefore, that none of the property taxed had commenced the foreign journey. Indeed, some of it remained in the County for nearly another year and received the police protection, fire protection and other benefits accorded by the County and the State.

Under the applicable decisions of this Court the property taxed had not at the time of the imposition of the tax acquired an export status. As stated in *Cornell v. Coyne*, 192 U.S. 418, 427, the constitutional exemption "does not mean that articles exported are relieved from the prior ordinary burdens of taxation which rest upon all property similarly situated. The exemption attaches to the export, and not to the article before its exportation. * * *"

Appellants suggest at pages 27 and 28 of their opening brief that affirmance of the decision of the California Supreme Court would amount to holding that seaboard states could tax goods "sent from other states" so long as they are not loaded on a common carrier. The decision of the California Supreme Court does not in the slightest degree constitute a holding that goods sent from other states may be taxed by the seaboard states. No such problem even was involved. The facts plainly show that this is not a case involving taxation of goods "sent from other states." The problem here presented is whether property,

located at the time of purchase in the state in which the tax is imposed, which property has been part of the general mass of property in the state subject to taxation over a considerable period of time, a substantial part of which, on tax day, still is standing undismantled, and none of which has been moved from the site where it was located at the time of purchase, has ceased to be part of the general mass of property in the state, subject to taxation in the usual way. The California Supreme Court answered the question by applying the test approved by this Court in *Richfield Oil Corporation v. State Board of Equalization*, 329 U.S. 69, 79.

It is not accurate to state, as appellants have done at page 40 of their opening brief, that the California Supreme Court held that the work of dismantling, packaging, *and loading on the cars of the railroad* by the dismantler was not the equivalent to delivery to a common carrier for transportation, for none of the property taxed had been loaded on the cars of the railroad and much of it still was undismantled.

The statements at pages 6, 26, 36 and elsewhere in appellants' opening brief concerning the decision of the Supreme Court of California, are inadequate for they convey the impression that the Court held that the only way property may become an export is by delivery to a common carrier. Such was not the extent of the holding.

Despite appellants' assertions to the contrary, the Supreme Court of California recognized in its opin

ion that exportation may commence by means other than delivery to a common carrier for transportation. It applied the test expressed by this Court in *Richfield Oil Corporation v. State Board of Equalization*, 329 U.S. 69, 79, that

> "goods do not cease to be part of the general mass of property in the state, subject, as such, to its jurisdiction, and to taxation in the usual way, until they have been shipped, or entered with a common carrier for transportation to another state, or have been started upon such transportation in a continuous route or journey."

It was of the view that, judged by this standard, the property included in the assessment had not acquired an export status entitling it to exemption from property taxation.

Appellants seek to have this Court hold that property which had not been delivered to a common carrier for transportation, which had not been moved from the site where it was located when it was purchased, and a substantial part of which still was standing in an undismantled condition, nevertheless was in export on tax day. Appellants have not cited and we are not aware of any decision of this Court which would justify such a result.

II. AN INTENT TO EXPORT PROPERTY DOES NOT CONFER UPON THE PROPERTY AN EXEMPT STATUS AND NEITHER DOES THE EXISTENCE OF A CONTRACT OF SALE OF PROPERTY TO BE EXPORTED.

This Court has made it clear in its prior decisions that the intent to export property is not sufficient to confer upon it an exempt status and the same is true even if the intent has ripened into a contract of sale for exportation.

Cases such as *Cornell v. Coyne*, 192 U.S. 418, and *Coe v. Errol*, 116 U.S. 517, 524, clearly demonstrate that intent to export is not sufficient to confer exemption, even though the property ultimately is exported. In *Coe v. Errol* this Court said:

> ". . . It seems to us untenable to hold that a crop or a herd is exempt from taxation merely because it is, by its owner, intended for exportation. If such were the rule in many States there would be nothing but the lands and real estate to bear the taxes. Some of the Western States produce very little except wheat and corn, most of which is intended for export; and so of cotton in the Southern States. Certainly, as long as these products are on the lands which produce them, they are part of the general property of the State. And so we think they continue to be until they have entered upon their final journey for leaving the State and going into another State. . . ." (pp. 527-528).

And it has been held that even though there is a contract requiring the exportation of all property manufactured during a specified period of time "The exemption attaches to the export, and not to the arti-

cle before its exportation. . . ." *Cornell v. Coyne*, 192 U.S. 418. See also *Heisler v. Thomas Colliery Co.*, 260 U.S. 245, 259-261; *Coe v. Errol*, 116 U.S. 517, 524.

Appellants, at page 57 of their opening brief, state that it was "intended" that the property should be placed on the cars of the railroad, but prior decisions of this Court have made it clear that the mere intention to place property on a carrier is not sufficient to give it an export status. Neither is it sufficient that the "object" of the parties to the transaction is the exportation of property to a foreign destination, despite the contrary suggestion at page 59, of appellants' opening brief.

In the opinion of the trial court in this case, referred to at page 52 of appellants' opening brief, the statement is made that there was no reasonable probability that the proposed export would not be concluded. However, it was equally true in *Cornell v. Coyne*, 192 U.S. 418, that there was no reasonable probability that the proposed export there would not be concluded.

It was argued in *Cornell v. Coyne* that the exportation or non-exportation of the filled cheese did not rest merely in the intention of the sellers but that they were absolutely bound under their contracts to export it, that the terms of their agreement would not permit them to change their minds. Nevertheless this Court held that the property had not acquired an export status.

Appellants argue that "certainty of the foreign destination" is sufficient to confer immunity from taxa-

tion. Brief contemplation of this argument, we believe, will demonstrate its error. There can be certainty of the foreign destination, for example, of property that takes years to produce, process and prepare for shipment. Suppose a seller in this country enters into a contract with a foreign purchaser to furnish a giant telescope. Would the telescope be an export while being ground and tested even though made under contract to particular specifications for use in a foreign country? An affirmative answer would mean that property which for years receives the services and protection of the state of its origin, does so free from any obligation to contribute to the costs of government. We submit that no such result was contemplated in the framing of the Import-Export Clause.

In the conclusion to their brief appellants assert that both parties to the transaction had but one thing in mind, the exportation of the property to South America. The same was equally true in *Cornell v. Coyne*, 192 U.S. 418, where exemption from the taxation was denied.

III. EMPLOYMENT OF A DISMANTLER AND A FORWARDING AGENT DID NOT CONFER AN EXEMPT STATUS UPON THE PROPERTY TAXED.

(a) Employment of a common carrier to dismantle but not transport property does not confer upon it an exempt status.

Appellants contend that all of the property assessed, including that which had not been dismantled, had acquired an export status because a common car-

rier was employed to dismantle but not transport the property. There does not appear to be any legal support for this contention.

Appellants assert that Bigge Drayage Co. was licensed by the Interstate Commerce Commission as a common carrier in interstate or foreign commerce and that when Bigge entered into possession of the cement plant on January 3, 1945, it was the same as delivery to a railroad or boat.

In making this contention appellants overlook several vital features of the case. One was the necessity of dismantling and preparation before shipment could occur. That was the purpose for which Bigge was employed, to dismantle and prepare the property for shipment. None of the property assessed was in the equivalent position of property which has been delivered to a railroad or boat.

Appellants' contention also overlooks the fact, referred to in our statement of the case, that Bigge was not employed in this case to perform the functions of a common carrier. Bigge Drayage Co., though it doubtless performed the functions of a common carrier for other persons in other instances, was not employed to and did not perform the functions of a common carrier in this case. It had the equipment to and did perform the functions of a dismantler. Any other dismantling concern could have performed the same functions, even though not a common carrier. Bigge Drayage Co. was not employed to and did not transport the property away from the plant site. (R. 21,

30, 40.) All of the services performed by it were performed on the plant site. The common carrier which transported the property away from the plant site was the Atchison, Topeka and Santa Fe Railway Company and none of the property assessed had been delivered to that railroad company by tax day, March 5, 1945. None of the property assessed, by March 5, 1945, had been *"delivered to a common carrier for transportation"* within the meaning of the opinions of this Court. (*Coe v. Errol,* 116 U.S. 517, 527; *Richfield Oil Corporation v. State Board of Equalization,* 329 U.S. 69, 79.) This Court in referring to delivery to a common carrier obviously meant delivery to one who *in the particular situation involved* was performing the functions of a common carrier. This Court, moreover, in referring to delivery to a common carrier as constituting the commencement of an interstate or foreign movement has been careful to add the words "for transportation" and we believe there is no justification whatever for inferring from the language used that it was intended to apply to a case in which the company involved does not perform the functions of a common carrier but merely dismantles and prepares property for shipment.

We respectfully submit that even if an additional element had been present here, namely, that after Bigge had dismantled and packed the property for transportation it also was to transport the property as a common carrier, nevertheless the applicable authorities indicate that even under those circumstances the exportation would not be deemed to have

commenced by tax day, March 5, 1943. Suppose, for example, that in the case of *Cornell v. Coyne*, 192 U.S. 418, the manufacturer of filled cheese also had been a common carrier. Can there be any doubt that the cheese would not have acquired an export status prior to the commencement of its transportation abroad?

See also *Heisler v. Thomas Colliery Co.*, 260 U.S. 245, 259-261; *Coe v. Errol*, 116 U.S. 517, 524.

These and other decisions of this Court clearly demonstrate that dismantling and preparation for export are not sufficient to give property the status of exports. Here none of the property had advanced beyond the stage of preparation for shipment, so even if Bigge had been employed also to transport the property, which it was not, it seems evident that the tax still would have been valid.

Efforts of appellants at pages 47 and 48 of their opening brief to liken the relation of Bigge to that of a common carrier for transportation are not convincing. The argument is worded as if all of the property taxed had been delivered by Bigge to the railroad; whereas the record clearly shows that none of the property taxed had been delivered to the railroad and much of it had not been dismantled. *Coe v. Errol*, 116 U.S. 517, presents a much stronger case for an exemption from tax but this Court held that the preparatory movements there involved did not give the property immunity from state taxation.

The statement at page 44 of appellants' opening brief that at the time the contract was made with

Bigge it was considered that a possibility might occur in which an allocation of shipping space had been made and that no railroad cars would be available to transport it in time to meet the boat, is not supported by the record. We find nothing in the contract with Bigge, or elsewhere in the record, to support this statement even if it had any legal significance, which we do not believe it has.

(b) Employment of a forwarding agent does not confer an exempt status on property which has to be dismantled and prepared for shipment.

Employment of a forwarding agent by the purchaser did not confer an exempt status on the property taxed. Property which has to be dismantled and prepared for shipment is not an export whether arrangements for the dismantling and preparation for shipment are made directly by the purchaser or through a forwarding agent. In *Coe v. Errol*, 116 U.S. 517, 527, the out-of-state owner was in possession of the logs and making arrangements for their transit out of the state but this Court nevertheless held that the journey had not yet commenced. In the instant case work of dismantling and preparation for shipment remained to be done prior to the transportation of such property, for which compensation was agreed to be paid in the amount of $120,000. (R. 38.) Here the forwarding agent, Vanderburgh & Co., Inc., arranged with Bigge Drayage Co. to dismantle and prepare the property for shipment, but this does not mean that the property thereupon acquired an export status.

At page 59 of their opening brief appellants again urge the argument that employment of the forwarding agent was sufficient to give all of the property an export status even before it was dismantled. This would mean that property would be an export even though work had to be done on it before it could be shipped. Surely if a forwarding agent was also a manufacturer of property the property would not be regarded as an export while it was being manufactured even though it was being manufactured by a forwarding agent. In other words, the mere employment of a forwarding agent in the transaction does not give the magic touch of exemption.

Appellants ask this Court to go far beyond the boundaries of any decision which it has rendered on the subject. The applicable decisions of this Court, we think, clearly indicate that the property here involved, a substantial part of which was still standing undismantled in Merced County, had not acquired the status of an export at the time the tax was assessed.

IV. SHIPMENT PRIOR TO TAX DAY OF A PORTION OF THE PROPERTY SOLD TO A FOREIGN PURCHASER DID NOT CONFER EXEMPTION UPON THE PROPERTY STILL REMAINING IN THE COUNTY ON TAX DAY.

Appellants argue that because part of the property which was purchased by Empresa had been shipped out of the State by tax day, all of the property was exempt from tax, including that still standing in the County in an undismantled condition.

Appellants argue that what they purchased was an entire operating cement plant and that when any part of the property purchased had been shipped it all should be regarded as moving in export, even that which still was standing in an undismantled condition. We are not aware of any decision of this Court which supports the position contended for by appellants.

Moreover, as mentioned in our Statement of the Case, while for purposes of convenience the property sold was referred to in the contracts as the "cement plant", it was not the entire indivisible unit which appellants seek to make it appear. In the first place all of the property at the plant site was not sold to Empresa. Certain of the machinery, equipment, structures, facilities, parts, supplies and other items were reserved from the contract of sale. (R. 25.) The property sold to Empresa included machinery, equipment, removable structures, removable facilities, spare parts, supplies and miscellaneous items. (R. 23-25, 30-31.) It included such items as gasoline engines, a cate pillar tractor, motors, lathes, wiring supplies, hand tools, twine, furniture and welding equipment and supplies, to mention only a few. (Exhibit 5 of the Agreed Statement of Facts, R. 63-76.) The reference "cement plant" also includes certain machinery, equipment, structures, spare parts and supplies which at one time had been located at a certain quarry at Emory, California, but which, when the contract of sale was entered into, were located at the site of the main plant at Merced. (R. 23.)

Appellants contend that because a portion of the property purchased by Empresa had been shipped out of the county prior to tax day that all of the property purchased thereby acquired an exempt status. The trial court held in accordance with this contention but in so doing it made erroneous assumptions concerning the facts in *Hughes Bros. Timber Co. v. Minnesota*, 272 U.S. 469. The trial court viewed that case as authority for the decision which it rendered herein, that because part of the property, not included in the assessment, was moving on a foreign journey on tax day, all of it was exempt under the Import-Export Clause, even that which was still at the site in Merced County, some of which remained there for nearly another year.

The trial court in referring to the *Hughes Bros. Timber Co.* case said (R. 91-92):

> "* * * In that case pulp wood logs had been sold in Minnesota for transport to another state, the transportation to be made by floating the logs down a small river to its connection with another. In preparation for the delivery, the timber was logged and the logs taken down to the stream and placed, some of them on the ice and the balance on the bank, awaiting the breaking up of the ice. The ice broke April 2nd 'when the drive of the logs began, those on the ice moved by themselves and those on the bank were pushed in.' The decision does not state how long it took to 'push' in the logs. There were 10,000 cords of these logs and it is quite improbable that they had all been floated by May 1st, which is the day upon which they were attempted to be taxed. No question of

dividing the tax was raised; it seemed to be conceded that the movement of some of the logs was the beginning of the movement of them all * * *."

Thus the trial court assumed that in the *Hughes* case not all of the logs actually were moving on tax day, but that because some were moving, all were regarded for purposes of the commerce clause as moving. It appears from the record in that case, however, that such were not the facts, but that on the contrary all of the logs were moving down the stream on their interstate journey on tax day.

In the *Hughes* case the drive of the logs started in the Swamp River which flowed into the Pigeon River. Tax day in the *Hughes* case was May 1st. The trial court in that case found (Hughes R. 65):

"* * * That the floating of said timber commenced on the 29th day of April, 1922, and on the 1st day of May thereafter *all of said timber* was in said Pigeon River being floated down to Pigeon Bay * * *." (Emphasis added.)

The testimony upon which this finding in the *Hughes* case was based included the following testimony of an employee of the *Hughes Bros. Timber Co.* (Hughes R. 10):

"Q. Now, when in the year 1922 did the drive on the Swamp River commence?

A. The time for the drive in the Swamp River commenced on the 29th.

Q. The 29th day of——

A. Of April.

Q. Were you there?

A. I was there.

Q. And did you keep the time of the men?

A. I did.

Q. Was all the pulpwood that was piled on the banks put into the river on or by the 29th day of April?

A. Yes."

Thus the decision upon which great reliance was placed by the trial court has no application here since all of the property involved in the *Hughes* case was moving on its interstate journey on tax day.

We already have explained why it is not accurate to refer, as appellants do, to the property here involved as "an article, indivisible by its very nature, an entire, complete and operative cement plant". The physical facts are that the property was divisible and in fact was divided as of tax day, March 5, 1945. It is confusing for appellants to refer at page 43 of their opening brief to "an article", for the property here sold included many items, as we previously have indicated.

Appellants assert at pages 42 and 43 of their opening brief that a decision contrary to that for which they are contending would mean that tax liability would be determined on the basis of the amount of oil which had not yet gone through the pipes into tank cars being loaded. In making such argument we wonder if the appellants mean to urge that oil in place in the ground is to be exempt or if timber standing in the forest is to be exempt merely because

there is a contract pursuant to which the property is to be shipped to a foreign destination.

We think that appellants' assertion that the California Supreme Court has not cited any cases to support its decision cannot be sustained but that on the contrary the decisions cited by the California Supreme Court fully support the decision which it reached. Moreover, it should be observed that the appellants, although having the burden of establishing their right to a refund of tax, have not been able to cite any cases directly supporting their position.

V. MOVEMENT SUCH AS WAS INVOLVED IN THE DISMANTLING OF THE PROPERTY WAS PRELIMINARY OR PREPARATORY IN NATURE AND WAS NOT THE FINAL MOVEMENT OUT OF THE STATE LAUNCHING THE PROPERTY UPON ITS JOURNEY TO A FOREIGN DESTINATION.

Appellants contend at page 43 of their brief that exportation commences with the first movement of the goods toward the sea and that the dismantling, packaging and loading operations of Bigge was such a movement. Again it is necessary to point out that much of the property taxed had not been dismantled and none of it had been loaded. It is inaccurate, therefore, to infer, as appellants do at page 43, that any of the property taxed had been loaded on the railroad cars.

We submit that appellants' argument, that the machinery and equipment, the instant it was moved in the process of dismantling and packaging at the plant

site, thereupon was launched upon its journey to a foreign destination within the meaning of the prior decisions of this Court, is without merit.

Of course, as to approximately half of the property taxed, which still was standing in an undismantled condition, this argument would be unavailable because it had not even been moved around on the plant site. To say that such undismantled property was moving in export could be equivalent to saying that coal which had not been mined, or oil which still was in the ground, or timber which had not been cut, was moving in export. This Court already has emphatically expressed the contrary view. (*Cornell v. Coyne*, 192 U.S. 418, 427, *Coe v. Errol*, 116 U.S. 517, 527-528.)

As to that portion of the property taxed which had been dismantled by tax day, March 5, 1945, but most of which had not been packaged and none of which had been loaded on the railroad cars at the plant site, the decisions of this Court likewise plainly show that it was subject to taxation. Suppose grain is sold to a foreign purchaser. Does it become an export when it is being cut in the field? Does it become an export when it is being threshed? Does it become an export when it is being put in bags? The prior decisions of this Court demonstrate that the answer to these questions is no, that such movements of the grain as are involved in its cutting, threshing and packing are preparatory movements and not the final movement out of the state launching the goods upon their journey to a foreign destination.

In *Coe v. Errol*, 116 U.S. 517, cited by this Court in *Richfield Oil Corp. v. State Board of Equalization*, 329 U.S. 69, 79, the logs had been cut down in New Hampshire and hauled to the Town of Errol in that State where they were, on tax-day, resting on the banks of a stream down which they were to be floated to the State of Maine. It was held that this was merely preparatory movement and not the final movement out of the state which would launch the logs upon their interstate journey.

In *Cornell v. Coyne*, 192 U.S. 418, the cheese had been manufactured and placed in packages at the time the revenue stamps were applied for. This Court did not regard the movement of the cheese while it was being manufactured and packaged as being part of the final movement out of the state but regarded it rather as being preparatory in nature. It said, p. 427:

> "... The exemption attaches to the export and not to the article before its exportation. ..."

By way of contrast, the baseball bats in *A. G. Spalding & Bros. v. Edwards*, 262 U.S. 66, had been loaded on the vessel of a common carrier, and in *Richfield Oil Corp. v. State Board of Equalization*, 329 U.S. 69, the oil had been loaded into the hold of a vessel owned by the purchaser.

Here, as we have seen, approximately half of the property taxed was standing in an undismantled condition on tax day, most of that which was dismantled had not been packaged, none of the property taxed

had been loaded on the cars of the railroad which were to carry it away from the plant site, all of the property taxed still was at the site where it was located when it was purchased, and much of it remained in the county for nearly another year. Under these circumstances, we submit that the Supreme Court of California correctly held that the property taxed did not enjoy constitutional immunity and that it should bear some of the costs of government.

VI. NO QUESTION OF VALUATION IS PRESENTED

Appellants make statements with respect to valuation which we believe do not require an extended answer. The short answer is that the question of valuation is not presented on this appeal. It was not raised in the protest which was filed when the tax was paid. No question of valuation was raised by appellants before the County Board of Supervisors, sitting as a Board of Equalization. Consequently appellants failed to exhaust their administrative remedies. Therefore, the question of valuation could not be made and was not made an issue in the trial Court. The question was not presented either by the pleadings or by the stipulation of facts. It is not, and could not be, included in the assignments of error.

VII. THE CASES RELIED UPON BY APPELLANTS DO NOT SUPPORT THE POSITION FOR WHICH APPELLANTS CONTEND.

Appellants assert that the instant case cannot be distinguished from *A. G. Spalding & Bros. v. Edwards*, 262 U.S. 66. We think there are a number of clear points of distinction. One feature which serves to completely distinguish the *Spalding* case is referred to by this Court at page 70 of the *Spalding* opinion, where it is said: "*The overt act of delivering the goods to the carrier marks the point of distinction between this case and Cornell v. Coyne*, 192 U. S. 418 * * *" (Emphasis added.) Here the stipulated facts show that none of the property taxed had been delivered to the carrier (The Atchison, Topeka & Santa Fe Railway Co.).

In the *Spalding* case this Court recognized the necessity of fixing a point at which, in view of the purpose of the Constitution, the export must be said to begin, and also recognized that there would be other points very near to it on the other side. We submit that the present case is on the other side. In the *Spalding* case this Court at page 69 observed that, for example, "while the goods were in process of manufacture they were none the less subject to taxation if they were intended for export, and made with specific reference to foreign wants * * *", citing *Cornell v. Coyne*, 192 U.S. 418 and *Heisler v. Thomas Colliery Co.*, 260 U.S. 245.

On the other hand, said this Court, no one would doubt that the goods were exempt after they had been loaded upon the vessel for Venezuela and a bill

of lading issued. In the *Spalding* case, at the time of impact of the tax, the goods had been loaded upon the vessel for Venezuela but the bill of lading had not been issued. It was with reference to this fact situation that this Court made the statement, quoted by appellants at page 51 of their opening brief, to the effect that: "* * * The fact that further acts were to be done before the goods would get to sea does not matter so long as they were only the regular steps to the contemplated result. Getting the bill of lading stands no differently from putting the goods on board ship. * * *"

In the *Spalding* case, therefore, the goods had been loaded upon the vessel for Venezuela and were regarded as exports although the further act remained to be done of issuing a bill of lading. It certainly does not follow from this that where the acts to be done include the dismantling and packaging of property prior to loading it on a carrier, that such property is an export.

The case of *Clarke and Co. v. Clarke,* 3 Woods 408, cited by appellants, is not a decision of this Court but of a lower federal court. It was decided in 1877, nine years before this Court rendered its opinion in *Coe v. Errol,* 116 U.S. 517. The *Clarke* case was decided, therefore, without the benefit of the exposition of the applicable principle which later appeared in *Coe v. Errol.* Moreover, in the *Clarke* case, unlike the present case, the property had been moved from the place where it was located when it was purchased.

We take issue with the statement at page 44 of appellants' opening brief to the effect that the view of the California Supreme Court is directly contrary to the recent decision of this Court in *Richfield Oil Corporation v. State Board of Equalization*, 329 U.S. 69, 82. The quotation from that opinion appearing at page 44 of appellants' brief must be considered in the light of the facts of the *Richfield* case which show that the property there involved had been delivered into the hold of the ship, and this Court stated at pages 82 and 83 of the *Richfield* opinion that *the delivery of the oil into the hold of the vessel* marked the commencement of the exportation of the property. By way of contrast it will be recalled that here a substantial portion of the property had not even been dismantled on tax day and none of it had been moved from the site. As we previously have mentioned, the California Supreme Court applied the test laid down by this Court in the *Richfield* case in which this Court endorsed the language set forth in its earlier opinion in *Coe v. Errol*.

Appellants' reliance upon the *Richfield* case as authority for their position here amounts to an effort to make that case do the work of a decision holding that the sale of oil in place in the ground *ipso facto* converts that oil into an export, before it has been removed and, of course, before it has been loaded on a vessel. It is evident that such contention goes far beyond the decision of this Court in the *Richfield Oil* case.

With reference to the cases of *United States v. Hvoslef*, 237 U.S. 1, *Fairbanks v. United States*, 181 U.S. 283, *Thames & Mersey Insurance Company v. United States*, 237 U.S. 19 and *N. Y. and Cuba Mail S. S. Co. v. United States*, 125 F. 320, cited at page 39 of appellants' opening brief and the quotation from *Willcuts v. Bunn*, 282 U.S. 216, 228, it should be noted that no tax on the process of exportation or on the transactions and documents embraced in that process is here involved. The tax is on property and the only question is whether the property assessed had become an export by tax day, March 5, 1945.

Appellants at page 40 of their opening brief cite the case of *Puget Sound Stevedoring Company v. Tax Commission*, 302 U.S. 90, 92, 94. We think it is readily apparent that this case has no application here. None of the property taxed had been loaded, nor is this a tax on the process of loading.

Appellants cite cases at pages 56 and 57 of their opening brief, *Carson Petroleum Company v. Vial*, 279 U.S. 95, 105-106, *Railroad Commission v. Worthington*, 225 U.S. 101, 108-111, and *Western Oil Refining Company v. Lipscomb*, 244 U.S. 346, 349-350, relating to continuity of a journey which has been commenced. We are not here concerned with the problem of whether there has been an interruption of the continuity of a journey once commenced, but whether the journey to a foreign destination has begun. Appellants cite *Hughes Bros. Timber Co. v. Minnesota*, 272 U.S. 469, 475, at pages 59 and 60 of their opening brief.

As we have previously pointed out, all of the logs in that case were moving down stream on tax day. The cases of *State of Texas v. Anderson, Clayton & Co.*, 92 F. (2d) 104, 107, and *Multnomah County v. Dant and Russell, Inc.*, 158 Ore. 350, 354, 75 P. (2d) 986, cited at page 60 of appellants' opening brief, relate to situations in which the final movement out of the state had commenced.

In *Dahnke Walker Milling Co. v. Bondurant*, 257 U.S. 282, 290, from which quotation is made at page 61 of appellants' opening brief, this Court was concerned with a problem of regulation, not taxation. Moreover, it is well established by decisions which we have cited that the mere purchase of property is not sufficient in and of itself to make the property an export within the meaning of the Import-Export Clause.

CONCLUSION.

None of the property assessed, by tax day, March 5, 1945, had been shipped, or entered with a common carrier for transportation to a foreign destination, or started upon such transportation in a continuous route or journey. Consequently it had not ceased to be part of the general mass of property in the state, subject, as such, to its jurisdiction, and to taxation in the usual way.

We respectfully submit that the decision of the Supreme Court of California is correct and should be affirmed.

Dated, San Francisco, California,
February 1, 1949.

Respectfully submitted,

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